No. 11899

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

One 1947 Model Ford V8 Station Wagon Automobile, Motor Number 20-327, bearing Montana 1947 License Number 22-T1307, together with its tools, parts, accessories and apuurtenances (seized from Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo),

Appellants.

Brief of Appellants

Upon Appeal from the District Court of the United States for the District of Montana

Merle C. Groene, Billings, Montana,
Attorney for Appellants.

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BILLINGS GAZETTE, BILLINGS, MONTANA

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BRIEF OF APPELLANTS

STATEMENT OF PLEADINGS AND FACTS

This is a proceeding brought by the United States of America, as Libelant, against one 1947 Model Ford V8 Station Wagon, seized from Ralph Melendrez, Ermelindo Escobedo and Leo Escobedo, Libelees. Hereafter the Station Wagon will be referred to as the automobile, Ralph Melendrez as the passenger, Ermelindo Escobedo as the owner, and Leo Escobedo as the driver.

The Libel of Information (R. P. 2), after setting forth the sovereign capacity of the Government, alleges the seizure of the automobile on the Crow Indian Reservation; that prior to the seizure, that the

passenger, the owner and driver had introduced and conveyed into the Crow Indian Reservation a quantity of wine; that at the time of the seizure all three were in possession of said wine. The prayer is for the forfeiture of said automobile.

In connection with said seizure all three were arrested and charged with introducing into and possession of liquor on the Crow Indian Reservation. Information (R. p. 7).

In the forfeiture proceedings an answer (R. p. 9) was filed on behalf of the owner and the driver and a lien claimant. The answer denies that the owner and the driver had introduced or conveyed into the Reservation wine, as alleged; admitted that upon search of the automobile some wine was found in the possession of the passenger, but denied that the automobile was used for the purpose of introducing or conveying said wine into the Indian Country. Further answering, the owner and driver alleged that at the time of the seizure, passenger was a guest in the automobile, was not driving the same and had no dominion over the same; that at no time preceding the seizure, nor at the time of the seizure, did the owner or driver or lien claimant have any knowledge or notice that the passenger had carried wine into the automobile or that it contained any wine.

A reply (R. p. 11) was filed by the Government, denying the allegations of the answer. Thereafter, the passenger entered a plea of guilty to the Information

(R. p. 13). Thereafter, it was stipulated that the evidence in the criminal proceedings against the owner and the driver should be considered as the evidence in the forfeiture proceedings. (R. p. 50-55) Thereafter, the owner and driver were duly tried before a jury on the criminal charge and the jury duly returned a verdict of Not Guilty (R. p. 49).

The evidence of the Government consisted of the testimony of a Government agent (R. p. 13), a policeman (R. p. 22), and another.

Evidence for the prosecution simply showed that after the seizure of the automobile, the Government agent found some wine in paper sacks in the back seat, clear in the back (R. p. 17). The automobile was a station wagon with three rows of seats, with doors for each seat at the side (R. p. 15). The place of seizure was on the Indian Reservation (R. p. 17).

Before the automobile left Hardin, Government agent and the policeman both testified as to certain facts, but they disputed each other. The agent clalimed he saw the passenger, one Robinson, and the driver come out of the Stockman, and the passenger was carrying two parcels and driver one or two small packages (R. p. 20). The packages passenger carried might have been something else besides wine (R. p. 21). When the seizure was made the automobile contained other packags, groceries and other stuff (R. p. 21). The policeman said that the three who came out of the Stockman were Robinson and two Escobedos, and testified

differently as to packages and who carried them (R. p. 24).

For defendants, owner and driver, the passenger testified that he bought three half-gallons of wine at the State Liquor Store and put it in the automobile on the floor in the back seat. Later, he met Robinson and one Autobee, and he got a bottle of wine and took it into the Farm Cafe where the three drank some of it. After they finished he put the wine bottle back in the automobile in the back seat on the floor (R. p. 29). Anyone getting into the driver's seat could not readily see the wine. In the back seat his children were sleeping and they had their packages in there with the wine (R. p. 30). He took it upon himself to put the wine in the automobile and did it without permission of the owner and without his knowledge (R. p. 30). He said nothing to the driver and as far as witness knew neither the owner nor the driver had any knowledge or any reason to suspect that there was wine in the automobile (R. p. 31).

Appellants, owner and driver here, testified positively that they knew nothing of any wine being in the automobile. The driver stated that he did not put any wine in the car but he did put in a sack of apples and a carton of cigarettes. When the car was stopped and the officers asked if they had any liquor in the car he told them he didn't have any and he had no reason to think otherwise (R. p. 43). The owner testified that he did not know there was any wine in the car until

the government agent picked it up, that no one had told him the wine was there, and he had no reason to believe it was there; that he put no wine in the car and he saw no one put the wine in the car (R. p. 44). Other evidence was introduced by witnesses for the driver and the owner.

Manuel Melendrez was in the front seat of the automobile; the owner, witness and driver all being in the first seat. He had no reason to suspect that any bottles were in the automobile (R. p. 40).

This, in substance, presents the salient points of the testimony, except that as will hereafter be noted. The lower Court mistakenly assumed that the cross-examination of the passenger indicated that he had the wine with him when he walked down to the automobile with the owner. In the decision the lower Court overlooked entirely the fact that the passenger testified on direct examination: "After we finished with the wine I put the wine bottle back in he car, in the back seat on the floor" (R. p. 29).

SPECIFICATION OF ERRORS

Appellants make the following specification of errors as contained in the statement of points upon which they intend to rely on this appeal as follows:

> (R. p. 59) "That the District Court erred in rendering judgment against libelees and appellants Ermelindo Escobedo and Leo Escobedo in that there is not sufficient evidence to justify the findings or judgment, and the order, decision and judgment are not supported by the evidence and

are contrary to law in the following particulars:

1. That there is no evidence in the record to support a finding by the Court that appellants, or either of them, had any knowledge whatsoever that the automobile in question contained any wine at the time it entered the Indian Reservation;

2. That appellant, Ermelindo Escobedo, being the owner of the car in question, and being wholly without any knowledge or notice whatsoever of the presence of wine in the said automobile when it entered the Indian Reservation, had no intent to violate any law of the United Sates, and the forfeiture of his automobile is contrary to law and equity;

3. That the order, decision and judgment is contrary to the evidence herein;

4. That the order, decision and judgment is contrary to law and the principles of equity."

ARGUMENT

For the purpose of presenting this matter to the Court we propose to address our argument in two parts, first, as to Point No. 1, and second, with reference to Points 2, 3 and 4.

SPECIFICATION NO. I

It is respectfully submitted that there is no legal evidence in the record connecting the owner or the driver with knowledge or notice that when the automobile left Hardin, or when it was seized, that there was wine in it.

It is true the lower Court made certain observations and findings which, with all sincerity, we respectfully submit are not supported anywhere by the record.

Most assuredly a forfeiture cannot be supported by surmise or conjecture and any conclusion as to facts must be based upon and sustained by a preponderance of the testimony, tested by legal rule.

Let us review some of these findings:

In its decision the lower Court said:

> "On the subject of knowledge on the part of the owner of the car the Government relies strongly on the testimony of Melendrez and Autobee developing circumstances showing that while the former was carrying the jug of wine back to the car the owner was with him, and could have seen the wine placed in the car; and, since they, the owner and Melendrez, had been drinking together at the Arcade bar, and were both going together towards the car with the latter carrying the jug of wine from which the contents had been nearly emptied, the responsibility was in the senior Escobedo to know whether the wine was in the car; he must have seen Melendrez carrying it towards the car; . . . Melendrez had already pleaded guilty to the criminal charge when he was called as a witness on behalf of the Escobedos, and the testimony relating to the walk to the car with the wine was developed by the District Attorney on cross-examination. This court is of the opinion that the testimony of Melendrez and Autobee in regard to the wine drinking in the cafe . . . brings the senior Escobedo in close contact with the jug of wine, etc." (R. p. 50-51)

We respectfully submit that the learned Trial Court had no right whatever to make such findings, if findings they are, because it was, first, the duty of the Government to prove the allegations of the libel by a preponderance of the testimony, and, second, there is no evidence to justify such statements.

We dislike reiteration, but we feel this Court ought to be fully informed as to the evidence. The Melendrez referred to in the lower Court's opinion was the passenger referred to by us. On direct examination he stated positively that after drinking some wine in the cafe, he put the bottle back in the automobile in the back seat on the floor. (R. p. 29)

On cross-examination he did testify that he and Autobee came out of the cafe and waited about ten minutes, then saw the owner and went over to the Arcade Bar with him. There is absolutely nothing in his cross-examination, or that of Autobee, even remotely tending to prove that the passenger had the remains of the jug of wine with him when they went to the Arcade. If we can say that his statements that he didn't do anything else once they stepped out of the cafe, except to go to the Arcade, coupled with his direct examination, operates as legal proof that he was carrying the jug of wine all around, then there is some justification for the Court's remarks, but we do not believe such to be the law.

Here we have on direct examination a positive statement that he did put the wine back in the car before he met the owner (R. p. 29), then on cross-examination witness stated that he took the wine into the cafe and remained with some other fellows about an hour and a half (R. p. 33), and then stated that he had been in the cafe all the time up until he saw the owner coming from the Stockman Bar (R. p. 33). We then are con-

fronted with a positive statement that he did put the wine back in the car and a presumption that arises from his testimony on cross-examination that because the didn' do anything else he must have had the jug of wine with him. We respectfully submit there is no legal evidence here sufficient to sustain the burden resting upon the Government to prove its case by a preponderance of the testimony.

20 Am. Jur., 1101.

Of course, the lower Court finally decided that the decision of this Court in U. S. v. One Chevrolet Coupe, 58 Fed. 2, 235, compelled it to order a decree of forfeiture of the automobile, and as to this we shall discuss that case later on in this brief. The facts, however, are such that there is no legal evidence to establish knowledge or notice on the part of the owner or the driver. The jury found them innocent of the criminal charge. The libel charges the owner and the driver with wilfully, wrongfully and unlawfully introducing and conveying into the Indian Reservation wine by means of said automobile and that they were in possession of the wine in said automobile (R. p. 4), and, as we have heretofore shown, and as we shall hereafter argue, the Government failed entirely to prove its case against them.

SPECIFICATIONS NOS. II, III AND IV

And so we now come to a consideration of specifications II, III and IV on the premise, as we have here-

tofore shown, that the Government failed to establish by a preponderance of the testimony, or any legal evidence whatever that appellants, owner and driver, introduced into the Reservation, or had in their possession any wine.

This brings us squarely to a consideration of the decision of this Court in U. S. v. One Chevrolet Coupe, 58 Fed. (2) 235. Does this decision compel an adverse finding against appellants? We think not.

This case was cited by the lower Court as conclusive and compelling it to declare the forfeiture. In order that we may be able to present our position properly before this Court we state that in that case the facts disclosed that the car was being driven by a bailee of the owner. This is important as it fits exactly into our theory for the knowledge of the agent in that case as to liquor being in the car was the knowledge of the principal.

It is true this Court in that decision indicated that under the amendment to Sec. 246, Tit. 25 USCA, a seizure and forfeiture of an automobile, regardless of the innocence of the owner, was justified. However, we respectfully submit this Court did not hold and will never hold that a forfeiture will be ordered in the following type of cases:

1. An automobile, driverless, containing a bottle of whiskey, is parked on a hill adjoining an Indian Reservation. The brakes loosen and the car runs down the hill upon the Reservation;

2. A car is stolen and the thieves put liquor in it and drive it onto the Indian Reservation.

We have carefully gone into this decision and the cases cited in support thereof, and among the cases cited we invoke the following language from Shawnee Nat. Bank v. U. S., 249 Fed. 583:

> "As we have said before, the statute is highly penal, and not in aid of the revenues. It must be, therefore, strictly construed, and all doubts resolved in favor of those against whom it is invoked."

In all of the cases that are cited in that decision we fail to find any case where a forfeiture was declared, excepting and unless there was a privity between the owner and the one driving the car.

In U. S. v. One Buick, 244 Fed., 961, the Court said:

> "By the terms of his mortgage he intrusted the possession of the automobile to his mortgagor Latta."

In Commercial Inv. Trust v. U. S., 261 Fed., 330, the Court said:

> "Although it is presented in the inerplea, plaintiff in error does not discuss the question as to whether or not the 1917 provision extends to the property of an innocent person; that is, a person not connected with the act of unlawful introduction."

In that case the plaintiff in error held a conditional sale contract on the car, again evidencing a privity between the owner and the party driving the car.

In U. S. v. One Seven-Passenger Paige Car, 259 Fed., 641, the Court again had a case wherein a lien

claimant was involved, again a case of privity between the owner and the one driving, and from this case we desire to quote at length since the history of Section 247, Title 25, USCA, is admirably set forth therein:

> "The Congress, on March 2, 1917, enacted the following provision (Indian Appropriation Act, 39 Stat. L. 970 (Comp. St. 1918, Section 4141a):
>
> 'That automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into Indian country, or where the introduction is prohibited by treaty or federal statute, **whether used by the owner thereof or other person** (bold face mine), shall be subject to the seizure, libel, and forfeiture provided in section twenty-one hundred and forty of the Revised Statutes of the United States.'
>
> "In Shawnee National Bank v. United States, supra, the Court in passing on a libel begun before the passage of the act of March 2, 1917, referred to said provision in haec verba:
>
> 'The enactment of this law by Congress was a legislative declaration that in the opinion of Congress section 2140, as it read when the seizure in this case was made, did not authorize the seizure and forfeiture of any of the articles mentioned in section 2140, except those owned by the guilty party.'
>
> "Libelant contends that this is a proceeding in rem, and that the guilty thing is the offender, and that this is to be forfeited irrespective of intervening leinholders. The mortgage stipulates that the mortgagor shall not remove or permit the removal of said property from the county of Oklahome, and tha said mortgagor shall not secretly run off, remove, or conceal, nor attempt to run off, remove or conceal, any of said property, nor permit such an act to be done, and in case said mortgagor shall violate or commit a breach of any

of said conditions the mortgagee may declare the mortgage debt due and immediately ake possession. It will here be taken as true that the automobile was taken out of Oklahoma county and into the Eastern district of Oklahoma without the consent or connivance of the mortgagee. However, this is no barrier to forfeiture if the statute imposes it. The statute being highly penal, and not in aider of the revenues, it must be strictly construed, and doubts resolved in favor of those against whom it is invoked. No person or case will be held within its terms unless clearly within its letter and legislative intent. A search of the Conpriation Act of March 2, 1917, was offered after the bill had passed the House and was being considered by the enate in committee of he whole. On page 2052, volume 54, of the Congressional Record, it appears that the fifth amendment thereto was to insert on page 4, line 13, after $150,00, the following:

> 'Provided, that automobiles or any other vehicles or conveyances used in introducing intoxicants **into he Indian country in violation of law, whether used by the owner thereof or other person,** shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States.'

"The bill as thus amended went to conference (pages 2931 and 2970, volume 54), and the first report provided that, in lieu of Senate Amendment No. 5 (which was the amendment quoted above), the following amendment be inserted:

> 'Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants **into the Indian Country, where the introduction is prohibited by treaty or federal statute,** whether **used by the owner thereof** or **other person,** shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States.'

"This report was again referred for conference.

In the second conference report (pages 3808 and 3811, volume 54) it was provided that in lieu of Senate Amendment No. 5, which has heretofore been set out, the following amendment be substituted:

> 'Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty, or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States.'

"The development of this legislation indicates that this provision was enacted with especial reference to conditions existing in Eastern Oklahoma. The introduction of intoxicating liquors from without the state into that part which was formerly Indian Territory being prohibited by act of Congress, and the manufacture, sale, and transportation of such liquors between points within the state being also prohibited by provision of the state Constitution, the rapid growth of cities and industrial and mining centers and general increase in population in said part of the state necessitated the utmost vigilance, fidelity, and efficiency among law enforcers. When section 2140 was first enacted in 1864, the usual mode of travel through the Indian country, frontier settlements, and remote regions was by means of stagecoach, freight wagon, steamboat, and sled. The carrying in such conveyance of intoxicating liquors by a passenger without the consent of its owner then did not work a forfeiture of the conveyance. With the coming of the automobile and its full development different conditions arose. Transportation by express or railroad being practically closed by law and the vigilance of the officers, the introducer and the illicit handler of intoxicants resorted to the automobile as an easy facility for carrying on such prohibited introduction and illicit traffic. If such

law violators may encumber such automobiles so as to minimize the actual investment of such introducer the financial hazard of the business is thus reduced. Hence the reason for the terms of the act to include not only automobiles but also to exclude the innocent lienholder from any protection in such forfeiture. See, also, Oklahoma Sessions Laws 1917, chapter 188; United States v. Birdsall, 233 U. S. 223, 34 Sup. Ct. 512, 58 L. Ed. 930."

This appeal is not being prosecuted by the libelee lien claimant for we believe that under the decision in question where there is privity between the driver of the car and the owner that the owner cannot escape forfeiture of the automobile on the ground that he, himself, did not know that his agent, or the one in privity with him, was using the automobile to introduce liquor into the Indian country. However, on behalf of the appellants, where the owner and driver of the car, having no knowledge or reason to suspect that wine was in the car, we respectfully submit the decision in U. . v. One Chevrolet Coupe, supra, does not apply.

In U. S. vs. One Buick Sedan, 64 Fed. Supp. 905, the Court said:

"Possession of intoxicating liquors in (Indian) country appears to be the criterion that is most controlling here.
Harris vs. U. S., 8 Cir. 249 L. 41.
Custer vs. Louis, 8 Cir. 254 F. 917.
Brown vs. U. S., 8 Cir. 265 F. 623."

Referring back to the statutory charging words "used in introducing," we respectfully submit that the word "introduce" compels by its very definition

some intention to act on the part of the driver of the automobile. For instance, in the New Century Dictionary, "introduce" is defined as "to lead, bring, or put into a place, position . . . etc., and . . ."

That this is right is borne out by the language of the Supreme Court of the United States in **Goldsmith, Jr.,-Grant Co. v. United States,** 65 L. Ed., page 379, and there the Court said:

> "It is said that a Pullman sleeper can be forfeited if a bottle of illicit liquor be taken upon it by a passenger, and that an ocean steamer can be condemned to confiscation if a package of like liquor be innocently received and transported by it. Whether the indicated possibilities under the law are justified we are not called upon to consider. It has been in existence since 1866, and has not yet received such amplitude of application. When such application shall be made, it will be time enough to pronounce upon it. **And we also reserve opinion as to whether the section can be extended to property stolen from the owner, or otherwise taken from him without his privity or consent."**

See, also, **U. S. v. 1 Ford Coupe,** 71 L. Ed. 321.

Likewise, the State of California has forfeiture laws just as strict as the Federal Laws, and there the Court uses the following language:

> " 'An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the owner's consent to do so in any manner at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner.' That reasoning is directly applicable here. The extent of the implied limitation on the operation

of the statute is that an owner's interest cannot be forfeited if the car has been taken without the owner's consent, but if that consent is given the fact that the bailee violates restrictions as to either time or place of use is an immaterial factor."

People v. One 1941 Chrysler, etc.
162 Pac. (2d) 653.

The word "introduce" is synonymous with the word "carry."
U. S. v. Buckles, 97 S.W. 1022.

Intoxicating liquors are introduced . . . when the liquors have been INTENTIONALLY TRANSPORTED.
Reynolds v. State (Ariz.) 161 Pac. 885.

The word "used" is an active, transitive verb, AND INVOLVES IN ITS DEFINITION SOME ACTION OR PURPOSE ON THE PART OF THE PERSON USING THE VEHICLE.
Tuttle v. State (Ga.) 110 S.E. 455.

Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others.
Rice v. Frayser, 24 Fed. 460.
Williams v. Buchanan (N.C.) 35 Am. Dec. 760.

In a liquor prosecution, wherein defendant claimed that he knew nothing of liquor being on his premises, defendant held entitled to instruction that, if liquor was on premises, without his authority, knowledge or consent, he was not in unlawful "possession" of liquor and should be acquitted.
Mullins v. Commonwealth (Ky.) 295 S.W. 987.
Keifner v. Commonwealth (Ky.) 7 S.W. (2) 1066.

"Under this rule if the property used for an unlawful purpose was intrusted by the owner to the person who, without the owner's knowledge used it for an unlawful purpose, the innocence of the owner will not prevent a forfeiture, but if the

> property was taken from the owner without his permission or consent and used by the taker for an unlawful purpose it cannot be forfeited therefor."
>
> 27 CJS 14.

and cases cited.

Analagous to the situation here let us call the Court's attention to the case of Bring v. U. S., 6th Cir. 148 Fed. (2) 325. In this case, the Court had under consideration the statute with reference to a wholesaler failing to keep records and held that the failure to keep records must be wilful and intentional, and the Court says:

> "The Federal Alcohol Administration Act, 27 U.S.C.A., Section 201 et seq. together with 26 U.S.C.A. Int. Rev. Code, Section 2800 et seq., constitute a comprehensive scheme for the regulation and taxation of all transactions in distilled spirits, various provisions of the latter being in the nature of a revision of earlier statutes in force prior to the outlawing of liquor by the Eighteenth Amendment to the National Prohibition Law. In view of their nature and purpose their provisions do not speak in terms so prohibitorily absolute as, in an enactment which penalized a traffic currently conceived to be inimical to public and private morality, were deemed to be appropriate. So when Section 2857 provides penalties to be imposed upon a wholesale liquor dealer 'who refuses or neglects to keep such records in the form prescribed by the Commissioner,' failure to comply must be wilful and intentional. **Arrow Distilleries v. Alexander,** 7 Cir., 109 F. 2d 397, 406; **United States v. Monarch Distributing Co.,** 7 Cir., 116 F. 2d 11, 13. It is a construction warranted by the language used, the scope and intent of the enactment, and the fact that it no longer expresses a naional policy to control appetite by law."

If we have failed to make our client's position clear to the Court, it will be due more to our inability to formulate a proper Brief than our sincere conviction that, in this case, the Court should dismiss the forfeiture proceedings. If a person may steal an automobile and take it upon the highways and surreptitiously have liquor in it so that the automobile is subjected to forfeiture; if some stranger puts liquor in an automobile so that, without the knowledge of the owner, or his participation, the car is seized and forfeiture insisted upon; if this is the case, then we respectfully submit that such a procedure is violative of the 5th Amendment to the Federal Constitution.

We have been able to find only two cases which seem to be on all-fours with this. Judge Clark in analyzing the decision of this Court of the U. S. v. One Chevrolet Coupe, 58 F. 2d, 235, made the following observations:

> "My attention is called to the wording in the opinion of the Ninth Circuit Court of Appeals in United States v. One Chevrolet Coupe Automobile, supra, as follows: 'Appellant says, if we accept the contention of the appellant, **it is the automobile itself that is the offender and it is immaterial what the circumstances are.** This is the theory upon which a forfeiture is predicated.'
>
> "The bold face portion of the opinion is not the words of the Court. The comment of the Court is 'This is the theory upon which a forfeiture is predicated.' That does not, in my judgment, bind this Court to the general statement tha the car is the offender. It is a general rule but one, like most general rules, which is subject to certain excep-

tions."

And again on Page 421, Judge Clark said:

"Courts generally have held that when one loans his car to another he assumes liability for the acts of that person in using it contrary to law, but this provides no likeness to the circumstances here. Reedy at most was only a passenger and as said by the District Court of Appeal, Second District, Division 3, California, in the Case of People v. One 1941 Buick Sport Coupe, etc., 166 P. 2d 69, at page 73.

" 'On the facts presented by the findings in the instant case, e feel that an innocent owner, in possession of his vehicle, should not be made to suffer the drastic penalty of forfeiture where he has no knowledge, actual or implied, of the unlawful possession of narcotics by one who is riding with him. Although the legislature has not expressly exempted an owner, under such circumstances we feel that a forfeiture should not be permitted for a 'contrary determination would amount to an unconstitutional deprivation of property without due process of law.' People v. One 1941 Ford 7 Stake Truck, supra, (26 Cal. 2d 503, 159 P. 2d 641). The same principle, i.e., deprivation of property without due process, is as truly involved here as in the case of an owner whose car is stolen from him or who has not consented to the taking or use of his automobile.'

"The Statute on which this decision by the California Court is based is more strongly worded in respect to forfeiture than the statute (Se. 247, Title 25 U.S.C.A.) under which this action is prosecuted, and while it can be said that this provision taken literally includes the automobile used by James Reedy in this case, such a construction is so unreasonable and the resulting forfeiture so unjust it is certain, in my mind, that Congress had no such intention, and if they did so intend then it would be in violation of the due process

clause of the Constitution of the United States. Amend. 14."

And in the case of U. S. vs. 1 Model H. Farmall Tractor, etc., 51, F. Supp. 603, the Court said:

"The Supreme Court in its latest pronouncements on the subject reversed opinion as to whether this section of the statute can be extended to property stolen from the owner, or otherwise taken from him without privity or consen. **Goldsmith, Jr.-Grant Co. v. United States,** 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376; **United States v. One Ford Coupe Automobile,** 272 U. S. 321, 47 S. Ct. 154, 71 L. Ed. 279, 47 A.L.R. 1025.

"Other courts hold uniformly to a construction which protects the innocent owner of property from forfeiture where the property has been taken by a trespasser, or the owner has been deprived of possession without his knowledge and consent, or through his negligence. **United States v. Almeida,** 1 Cir., 9 F. 2d 15; **United States v. Two Barrels of Whiskey,** 4 Cir., 96 F. 479; **United States v. One Ford Coupe,** D. C. Idaho, 21 F. 2d 639; **United States v. One Buick Roadster,** D. C. Montana, 280 F. 517. See also: **United States v. One Saxon Automobile,** 4 Cir., 257 F. 251; **Beaudry v. United States,** 5 Cir., 79 F. 2d 650, 651.

"(1) Under the accompanying findings of fact, the parties using the tractor at the time of its seizure had obtained same through trespass and without the knowledge and consent of its owners. Nor did the owners negligently contribute to the violation of the internal revenue laws in their control and use of the tractor.

"The libel should be dismissed and the tractor returned to the claimant herein."

We respectfully submit that the lower Court was in error in the particulars urged and that the forfeiture

of the automobile in question should be dismissed.

Respectfully submitted,

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Attorney for Appellants.